No. 17-333

IN THE

Supreme Court of the United States

O. JOHN BENISEK ET AL,

APPELLANTS,

v.

LINDA H. LAMONE AND DAVID J. MCMANUS, JR.,

APPELLEES.

On Appeal from the United States District Court for the District of Maryland

BRIEF OF AMICUS CURIAE STEPHEN M SHAPIRO IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICUS[1]

Amicus Stephen M. Shapiro resides in Maryland's Eighth Congressional District. He is a registered Democrat who occasionally votes for candidates of other parties. Amicus filed the original and first amended complaints, pro se, in 2013 and was the petitioner when this case was before this Court in 2015. After the case was remanded in 2016, the appellants focused their challenge more narrowly on the harms to Republican voters who lived in the former Sixth District, and amicus withdrew from the case in November 2016 to avoid potential issues as to his standing.

Amicus maintains that partisan gerrymandering imposes impermissible harms to his representational rights under Article I, § 2 of the Constitution. It is his position that such harms impact Democratic, Republican, and Independent voters—even when it may ensure the election of a candidate that he supports. He is filing this brief supporting appellants' claims, which are focused on the First Amendment, by showing that Article I reinforces the protection of those same interests. The brief further demonstrates that this Court's racial gerrymandering cases provide a well-established template that the courts can readily apply to remedy these violations of Article I and

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amicus and his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

the First Amendment and thereby overcome the political question objection raised by appellees.

SUMMARY OF ARGUMENT

The premise underlying the allocation of seats in the House of Representatives is equality of representation among the states, with each state being assured of at least one seat, and equality of representation within each state. The Constitution, in Article I, § 2, requires that members of the House be chosen by "the People" but the legislature of the State of Maryland, by its gerrymandering being challenged in this case, has drawn the district lines so that it, not the People, effectively decide who will be their Representatives in Congress. The basis on which the challenged lines were drawn was the choice of political party of those who were moved. As a result, one third of all Marylanders were moved among the State's eight districts, including half of all the former residents of the Sixth District at issue here. As appellants demonstrate, that kind of partisan line drawing violates the First Amendment, and it is also wholly inconsistent with the premises underlying Article I, § 2 and the Equal Protection Clause. If, as this Court held in *Cook v. Gralike*, 531 U.S. 510 (2001), the required inclusion of a term-limits message on a ballot for the House of Representatives tipped the scales in violation of Article I, then surely the much more significant partisan gerrymandering here also violates that Article.

Reliance on Article I reinforces appellants' position that their claims are justiciable and that the massive transfers of voters by the State legislature in 2011 to achieve purely political ends undermines the equality principle underlying that Article. Even if some district lines in Maryland before 2011 were drawn to advantage one political party or the other, the courts can, as a practical matter, only go back so far to remedy current constitutional violations. For that reason, when engaging in redistricting, a state may ordinarily start with the prior districts and move only as many voters as needed to account for population changes reflected in the most recent census needed to equalize the populations in all districts. And in doing so, it may also consider well-established principles of line drawing that support effective representation. These include maintaining compactness, not unnecessarily breaking up political subdivisions, and recognizing natural geographic boundaries and other communities of interest. In this case, there were available options that both assured equal numbers of constituents in all the districts and maintained traditional considerations for redistricting. Under those alternatives, appellees would not need to have engaged in the massive partisan moving of voters that they designed to achieve — and did achieve — a congressional delegation that resulted in one more Democratic and one fewer Republican Representative.

This Court's recent decisions rejecting districts that were racially gerrymandered support appellants' position for two related reasons. First,

the standard defense in the racial gerrymandering cases is something to this effect: "We did not draw these lines for racial reasons, but for political purposes, and therefore the claim has no legal basis." But any line drawings for congressional districts based on the political party of the voters being moved violates the First Amendment and Article I, and they are no more acceptable than are race-based line drawings that this Court has repeatedly condemned. Upholding appellants' claim in this case will put an end to the hypocrisy of States defending against claims of racial discrimination in redistricting by arguing that "it's all political" when the two are inextricably intertwined and equally repugnant to the Constitution.

Second, in the past in cases such as *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004), this Court has refused to overturn gerrymandering schemes that were assumed to be unconstitutional because the Court was concerned that there was no "discernible and manageable" remedy that a court could impose. But this Court has not shied away from striking down racial gerrymanderings for that reason, despite similar difficulties. Therefore, if appellants' position is sustained, the courts will be able to impose the same type of remedy in a political gerrymandering case that they do where there is a racial gerrymander, because, for all practical purposes, the two are so often indistinguishable. Or, as this Court observed, "a State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

ARGUMENT

APPELLEES' PARTISAN GERRYMANDERING VIOLATED ARTICLE I AND THE FIRST AMENDMENT, AND IT CAN BE REMEDIED BY THE SAME TECHNIQUES USED IN RACIAL GERRYMANDERING CASES.

I. The Partisan Gerrymandering of the Sixth District Violates Article I, § 2.

Article I, § 2 provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." In *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), this Court applied that provision to require that congressional districts within a State have equal populations so that, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." Then in *Karcher v. Daggett*, 462 U.S. 725 (1983), it struck down a deviation of less than one percent between the largest and smallest districts. Beyond the holdings in those cases, their rationales support the conclusion that the partisan line drawing that created Maryland's current Sixth District violates Article I, § 2, as well as the First Amendment.

The *Wesberry* opinion is of particular relevance because of its concern with "debasing the weight of appellants' votes," 376 U.S. at 4, which is precisely what appellees did here by the massive

movement of voters in and out of the Sixth District based on the party registrations. The *Wesberry* Court in several places made clear that Article I prohibited indirect as well as direct means of denying citizens their right to equal votes:

> Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, see *United States v. Classic*, 313 U.S. 299 (1941), or diluted by stuffing of the ballot box, see *United States v. Saylor*, 322 U.S. 385 (1944). No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.

Id. at 17. The Court also observed that, when states formerly elected Representatives to Congress on a state-wide basis, they could not have given two or three times more weight to voters in the less populous areas, because the Framers never "intended to permit the same vote-diluting discrimination to be accomplished through the *device* of districts containing widely varied numbers of inhabitants." *Id.* at 530 (emphasis added). *See also Reynolds v. Sims*, 377 U.S. 533, 555 (1964), characterizing "[t]he right to vote freely for the candidate of one's choice [as] the essence of a democratic society," which cannot be undermined by "a debasement or dilution of the weight of a

citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

The *Karcher* plurality expressed similar concerns. The State had argued that the deviation there was acceptable because the variation was only *de minimis*, but the Court rejected that defense: "If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality." 462 U.S. at 731. If a 1% deviation in population is constitutionally impermissible because it undermines the right to vote for members of the House of Representatives, the far more significant impacts of partisan gerrymandering of the kind at issue in this case are equally impermissible under Article I, § 2. [2]

Two cases involving efforts by States to impose their views on term limits for candidates for the House of Representatives confirm that, no matter the form in which the intrusion on the

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[2] Equality does not preclude all variations: "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives. As long as the criteria are nondiscriminatory, see *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), these are all legitimate objectives that on a proper showing could justify minor population deviations." *Karcher*, 462 U.S. at 740. *See also Tennant v. Jefferson County Commission*, 567 U.S. 758, 764 (2012) (recognizing "avoiding contests between incumbents" and "desire to minimize population shifts between districts" as legitimate neutral state policies).

principle of one person, one vote, the goal of altering the free choice of the voters is impermissible. In *US Term Limits v. Thornton*, 514 U.S. 779 (1995), Arkansas denied candidates for the House the right to have their name appear on the ballot if their re-election would mean that they had served longer than the terms that were approved by the State. Even though such candidates could still run on a write-in basis, the Court struck down the ban because it violated a "basic principle: that the right to choose representatives belongs not to the States, but to the people." *Id.* at 820-21. The Court also invoked another principle directly applicable to this case:

> As we have often noted, "'[c]onstitutional rights would be of little value if they could be ... indirectly denied.' " The Constitution "nullifies sophisticated as well as simple-minded modes" of infringing on constitutional protections. ... In our view, Amendment 73 is an indirect attempt to accomplish what the Constitution prohibits Arkansas from accomplishing directly.

Id. at 829 (citations omitted). Just as appellees argue here that Democrats occasionally vote for Republicans and vice versa, the Court observed that, even if "incumbents may occasionally win reelection as write-in candidates, there is no denying that the ballot restrictions will make it significantly more difficult for the barred candidate to win the election" *Id.* at 831. Such

"handicapping a class of candidates" violated Article I, § 2 because "[t]o argue otherwise is to suggest that the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Id.*

The same result followed in *Cook v. Gralike*, 531 U.S. 510, 514 (2001), where the vice was the required inclusion on the ballot of one of the following statements next to the name of any candidate for the House of Representatives who did not abide by the State's approved term limits: DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or for non-incumbents such as the respondent, "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." In holding this to be an impermissible "attempt[] to 'dictate electoral outcomes'", *id.* at 526, this Court looked, as appellants urge this Court to do here, to the practical consequences of the challenged law: "the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office." *Id.* at 525. That disadvantage was enough to strike down the law without proving that the outcome of any election had been affected by it. Furthermore, as Justice Kennedy observed in his concurrence "Neither the design of the Constitution nor sound principles of representative government are consistent with the right or power of a State to interfere with the direct line of accountability between the National Legislature and the people who elect it. For these reasons Article VIII is void." *Id.* at 528.

Article I, § 2 gives the "People" not the States the right to elect the members of the House of Representatives. As part of the basis for its conclusion there, the Court in *Wesberry* contrasted its one person, one vote holding with the original manner of choosing the Senate, which under Article I, § 3, was by State legislatures, not the People, until the adoption of the Seventeenth Amendment in 1913. 376 U. S. at 13. This Court recently made a similar point in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652, 2677 (2015):

> The people of Arizona turned to the initiative to curb the practice of gerrymandering and, thereby, to ensure that Members of Congress would have "an habitual recollection of their dependence on the people." The Federalist No. 57, at 350 (J. Madison). In so acting, Arizona voters sought to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around." Berman, Managing Gerrymandering, 83 Texas L. Rev. 781 (2005).

The inescapable conclusion is that Article I, § 2 was plainly violated by appellees when they intentionally diminished the ability of the "People" of the former Sixth District to elect the Representative of their choosing by imposing this partisan gerrymander on them. The line drawing

would be just as unconstitutional if, instead of political party, the State had drawn its boundaries based on the religion, gender, or national origin of the voters. In all of those cases, a "device" of that kind can no more do "indirectly" that which the State is forbidden by Article I and by the First Amendment from doing directly. And, as amicus now shows, this Court's decisions remedying racial gerrymandering provide a roadmap for providing meaningful standards for granting relief that are not precluded by the political question doctrine.

II. This Court's Racial Gerrymandering Cases Provide the Mechanism by Which This Partisan Gerrymander Can Be Remedied.

"Don't let the perfect be the enemy of the good."

- Voltaire: "The best is the enemy of the good."
- Confucius: "Better a diamond with a flaw than a pebble without."

The overtly partisan manner in which the lines were drawn by appellees in this case is no different from what is taking place for congressional and state legislative districts in most States today. Democrats and Republicans alike recognize how undemocratic this process has become, and, although this Court has agreed that the results are unconstitutional, it has nonetheless thrown up its hands because no perfect solution has been found. *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004); *id.* at 316 (Kennedy, J., concurring in plurality's view that partisan gerrymandering is impermissible).

In this case, involving congressional gerrymandering, the First Amendment, re-enforced by Article I, § 2, applied on a district by district basis, provides the appropriate and manageable standard for significantly reducing the worst partisan gerrymanders. And doing so is no more difficult to employ than the techniques that this Court has mandated when it has found racial gerrymandering to be a violation of the Equal Protection Clause.

At the outset there are two important aspects of this case that narrow the issue before this Court. First, this challenge is by Republican voters in a single district whose claim is that massive numbers of voters from their party were moved out of the District while massive numbers of Democratic voters were moved in. Moreover, as appellants show, although the 2010 census required modest changes to the Sixth District, the number of voters who were moved in and out of this District, and inevitably in other Maryland Districts, was wholly out of proportion to the census-required changes. Accordingly, the constitutional injury occurred when the boundaries of the Sixth District were re-drawn and voters were massively moved in and out of the District for predominantly partisan purposes. The fact that the results in successive Congressional elections in the Sixth District all flipped from Republican to Democratic is a further harm to appellants, but their constitutional rights were violated the moment when the lines were drawn predominantly on the basis of political parties.

Second, the proper remedy is the one that this Court has used in cases where race was the predominant factor in drawing district lines and in moving voters: re-draw the lines for this District without racial (or here political) predominance, in conformity with the requirement of one person, one vote, and consistent with traditional principles of redistricting, such as compactness, continguity, and respect for the boundaries of political subdivisions and other communities of interest.

The gravamen of the harm in this case is that the State has moved hundreds of thousands of voters from one district to another based on their status as either registered Democrats or registered Republicans. Appellees contend that drawing lines on that basis does not invariably produce all of its supposed benefits, although using party registration significantly increases the likelihood of success in a District with 20.8% not registered with either party. Motion to Affirm at 8. Amicus agrees that even purely partisan gerrymandering does not do a perfect job in assuring that the party drawing the lines will always prevail. Thus, no matter how small the area targeted for the move may be, there will be members of the other party and independents caught in it. Moreover, voters move in and out of every district during the ten year period in which the boundaries are in place, and not all voters always hue to their party registration in the voting booth.

But even if a gerrymander is less than 100% effective in predicting election outcomes, the harm to all voters from assigning them to one district or

the other based on the assumption of those who drew the lines as to how they are likely to vote is no less offensive. In that regard, it is essentially the same injury as where lines are drawn, and voters re-assigned, primarily on the basis of race, which assumes that all black voters will automatically favor a black candidate, even though that assumption is almost certainly not correct.

In assessing the legality of appellees' conduct, it is essential to understand precisely what the First Amendment violation is under this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In both cases, the State made employment decisions that adversely affected the plaintiffs based solely on their failure to support the political party of those who made such decisions. The employees in *Elrod* were discharged (or threatened with discharge), while all but one of those in *Rutan* retained their jobs, but were denied promotions or other enhancements in their workplace situation. In finding a First Amendment violation in *Rutan*, this Court ruled that "deprivations less harsh than dismissal" still violated the First Amendment. *Id.* at 75. Indeed, one of the *Rutan* plaintiffs had only been turned down for a job, not fired, because he was of the "wrong" political party, and the Court nonetheless held that his complaint stated a valid claim for relief. *Id. at 79.*[3]

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[3] The dissenters in *Elrod* argued that, because most of the plaintiffs had obtained their jobs through the same political

This understanding of the violation as the act of making a decision based on a prohibited First Amendment ground is vital to refuting appellees' main defense on the merits: that appellants cannot show that the First Amendment-based line drawing actually affected the outcome of the congressional races in the Sixth District. Motion to Affirm at 11-19. But the job applicant in *Rutan* did not have to prove that she would have gotten the job in order to state a claim, any more than the plaintiffs in *Ricci v. de Stefano*, 557 U.S. 557, 562 (2009), had to show more than that there was some likelihood they "would have been promoted based on their good test performance." And as we now show, in the racial gerrymandering cases in which this Court has ordered relief, there has never been a requirement that the outcome of any election would have been different: it was the fact that the legislative lines were drawn with race as the "predominant" factor that was the constitutional violation. Once that violation was found, the Court had no difficulty in directing that the lines be redrawn without race as the predominant factor without running afoul of the political question doctrine.

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patronage system to which they now objected, they had no right to complain. *Id.* at 380. But even they recognized that a person who was seeking a job, but who lacked the "right" political connections, would not suffer from that same disability. *Id.* at 381 n. 4. The dissenters also acknowledged that denials affecting voters would present a different, and presumably more favorable, case. *Id.* at 382 n. 5.

Unlike other congressional redistricting cases, such as *Vieth v. Jubelirer*, 541 U.S. 267 (2004), which challenged the entire State's plan only under the Equal Protection Clause, this case challenges only the plan as it affects a single district. This is vital in terms of the remedy that will cure the violation. A court need not decide that there was partisan gerrymandering on a state-wide basis, but only that the lines drawn in this district were done "predominantly" on the basis of the political affiliation of the persons moved in and out of the district. That is precisely the focus in racial gerrymandering case, with race instead of political party, and this Court has never found that the needed remedies were precluded by the political question doctrine.

If there were any doubt as to the proper basis on which racial gerrymandering cases must be litigated, it was erased by *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257, 1265 (2015) (emphasis in original):

> A racial gerrymandering claim, however, applies to the boundaries of individual districts. It applies district-by-district. It does not apply to a State considered as an undifferentiated "whole." We have consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts*.

That contrast was explained by the Court in terms that are fully applicable to the First Amendment claims at issue here: "Our district-specific language makes sense in light of the nature of the harms that underlie a racial gerrymandering claim. Those harms are personal. They include being "personally ... subjected to [a] racial classification," as well as being represented by a legislator who believes his "'primary obligation is to represent only the members" of a particular racial group.' " *Id.* (citations omitted). To be sure, an unconstitutional gerrymandering of one district cannot be corrected without changing the boundaries of at least one and often several districts. However, that fact does not change the case from one focusing on the harms that have been done to those in the district alleged to have been unlawfully gerrymandered into a state-wide anti-gerrymandering challenge.

The path of the racial gerrymandering cases points the way to the proper resolution of this and other political gerrymandering cases. In both kinds of cases, the objection is made that all redistricting is political and it can never be otherwise because those who draw the lines will know, or have strong inclinations, as to how every proposal will affect the political alignment of the body for which the elections will be held. That is true whether the lines were drawn to move Republicans or (predominantly Democratic) African-Americans in or out because in both cases legislatures make their best guesses, supported by

advanced statistics and technology, as to how the new lines will affect the outcome. [4]

In *Shaw v. Reno*, 509 U.S. 630 (1993), this Court first faced the issue of the circumstances in which the use of race in congressional redistricting was unconstitutional. After noting that reapportionment statutes on their face do not make racial classifications, the Court observed, in language equally applicable to partisan gerrymandering, that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Id.* at 646 (emphasis in original).

On the other hand if "a district obviously is created solely to effectuate the perceived common interests of one racial group," that would be "altogether antithetical to our system of representative democracy." *Id.* at 648. As the Court amplified, a plaintiff states a valid claim "by

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[4] There may have been a time in some parts of the country where denying African-Americans the vote was a goal, regardless of their political party, but today everyone recognizes that racial gerrymandering is the equivalent of political gerrymandering because many plans are challenged on both grounds. *See Shaw v. Reno*, 509 U.S. 630, 636 (1993) (racial gerrymandering case followed unsuccessful political gerrymander case).

alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 649.[5]

In subsequent cases, the Court has clarified the standard by which unconstitutional racial gerrymanderings should be determined, and it is this quite manageable standard that amicus urges the Court to apply to the partisan gerrymandering that was done here. As enunciated in the follow-on case involving the same district, *Shaw v. Hunt*, 517 U.S. 899, 905-06 (1996), the Court held that a violation had occurred when "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," with the "highly irregular and geographically non-compact" shape of the District as evidentiary support for such a finding.[6] This Court has recently recognized

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[5] The existence of alternative maps by which the legitimate goals of redistricting can be met is desirable, but not necessary, *Cooper v. Harris*, 137 S. Ct 1455, 1479-80 (2017). Here, appellants have alleged that reasonable alternatives exist, 3 JA 647, ¶¶'s 125-126, which supports both their claim on the merits and increases the likelihood that this violation is one for which there is a proper remedy. Considering those alternatives may also bring forth evidence of other improper gerrymandering which would support the primary district claim.

[6] Appellants have made similar allegations here. Paragraph 58 of their complaint alleges that a direct trip from Bethesda

the "special challenges" that trial courts have in determining whether the predominant motive for the lines drawn was race, particularly "when the State asserts partisanship as a defense." *Cooper v. Harris*, 137 S.Ct. 1455, 1473 (2017); *id.* at 1488 (Alito, J. concurring in judgment, internal quotations & citations omitted) (race being "highly correlated with political affiliation in many jurisdictions ... makes it difficult to distinguish between political and race-based decisionmaking"). But this Court did not throw up its hands, nor, most importantly for this case, did the difficulty in deciding whether there had been a constitutional violation have any impact on the Court's willingness to afford a remedy, without a concern that finding appropriate relief would present a political question.

This Court in *Shaw v. Reno* observed that "racial and political gerrymanders are [not] subject to precisely the same constitutional scrutiny." 509 U.S. at 650. However the political gerrymanders referred to there were based on the Equal Protection Clause, not the much more potent First Amendment at issue here. More significantly, the challenge here is remarkably similar to the challenge in *Shaw* in several respects. Both cases focus on lines drawn for a specific district, and are not overall challenges to the manner in which the

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to Towson Maryland, all on interstate highways, would go "in and out of six congressional districts 14 times over just 50 relatively straight miles." 3 JA 629.

state drew all of its other district lines. Unlike statewide challenges to congressional redistricting like *Vieth*, determining the remedy required to repair a single district gerrymandering is a much more manageable inquiry because it does not require the court to re-do the entire state, although the state may choose to do that to comply with other requirements of law. Single district remedial orders can focus on whether there was improper political gerrymandering in the most recent line drawing, and ordinarily do not have to go back and correct all of the political gerrymandering since the process began. To be sure, that limited remedy will not correct all political gerrymandering performed in earlier cycles, but it will prevent the situation from worsening and perhaps start the state on a path to more neutral line drawing.

Second, the focus in both kinds of gerrymandering cases is on the movement in and out of the district, both in terms of the absolute numbers – how many people were moved to respond to the known population gap – and relative numbers – how many of each favored and disfavored group (racial or political) were moved in and out – and how did that affect the likely outcome of future elections. *See Alabama Legislative Caucus*, 135 S. Ct at 1266 (claim supported where appellants "presented much evidence at trial to show that the legislature had deliberately

moved black voters into these majority-minority districts").[7]

Third, in both kinds of cases, once the State has eliminated the unconstitutional lines drawn, it may make adjustments if they "reflect wholly legitimate purposes," such as "to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions." *Shaw* at 646; *see also Alabama Legislative Caucus*, 135 S. Ct at 1263 (permissible reasons include "traditional districting objectives, such as compactness, not splitting counties or precincts, minimizing change, and protecting incumbents"). In addition, in many jurisdictions, compliance with the Voting Rights Act may offer a defense. *See Cooper*, 137 S.Ct. at 1469. On the other hand, the "odious" nature of racial classifications, together with their threat "to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," *Shaw*, 509 U.S. at 643, may justify a closer examination of the justifications

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[7] The same massive movement of voters to cure small population shifts here was also present in the two recent racial gerrymandering cases. In *Alabama*, only 1000 individuals were needed to achieve population equality, yet "[o]f the 15,785 individuals that the new redistricting laws added to the population of District 26, just 36 were white—a remarkable feat given the local demographics." *Id.* at 1271. A similar choice to move large numbers of black and white voters, when only a change of 3000 was necessary to retain population equality in North Carolina's District 12, was significant in *Cooper*, 137 S. Ct at 1466.

alleged by the state than when the violation is based on the political party of the plaintiff.[8]

In short, while these differences *on the merits of a racial gerrymandering claim* may make the standards for determining a violation of a political gerrymandering different, none of them suggests that the remedy available in district by district racial gerrymandering cases would not be suitable for remedying the partisan gerrymandering at issue here. Accordingly, any such differences are irrelevant in deciding whether this case presents a political question because of the absence of "discernible and manageable standards" by which to create a remedy, as the *Vieth* plurality concluded in the context of an Equal Protection challenge to a state-wide redistricting plan there. 541 U.S. at 286-87.

Unstated in the racial redistricting cases is the fact that they focus on the last lines drawn and

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[8] Contrary to the assertion of the plurality in *Vieth*, that applying a First Amendment approach to gerrymandering under *Elrod* would require that all political considerations be "disregarded," 541 U.S. at 294, the Court in *Elrod* specifically left open the possibility of allowing support by a political party to be relevant, but only where it advanced "some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." 427 U.S. at 363. *See also, Branti v. Finkel*, 445 U.S. 507, 517 (1990): "Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment."

do not also require the State to remedy past violations. Thus, if race or political party were used in an unconstitutional manner to draw district lines in the past, the remedies provided may ordinarily begin with the lines already in place. While in one sense this is a weakness of these remedies, it can also be seen as a means of limiting what a court can be expected to do at the time of the litigation. In some ways, it is rather like the situation confronted by the Court in *Elrod v. Burns, supra,* in which the political patronage system being challenged had been in place for many years, yet all the Court did (or could realistically do) was to stop it from continuing. Thus, in contrast to cases in which the Court is being asked to re-shape an entire state's districting plan, the remedy sought here is much narrower because it focuses only on the fixing the harms done in one redistricting , although those lines cannot be re-drawn unless at least those in one other district are changed. Narrowing the scope of the relief sought significantly lessens the problem of designing an appropriate and manageable remedy. And while the relief accorded in any one redistricting case may be limited, over time the improper gerrymanderings should disappear or least be of lesser significance.

There is one final benefit from upholding the political gerrymandering claim here, both on the merits and against the defense of political question. In this Court's most recent racial gerrymandering cases, states defended their laws on the ground

that politics, not race was the predominant motivating factor and hence the law was immune from scrutiny. This Court in *Cooper v. Harris*, noted the "special challenges for a trial court" in sorting out the predominant factor where both race and politics point in the same direction. 137 S. Ct. at 1473. To the extent that courts rely on irregular shapes to discern racial motivations, "such evidence loses much of its value when the State asserts partisanship as a defense, because a bizarre shape—as of the new District 12—can arise from a 'political motivation' as well as a racial one." *Id.*

More basically, for a state to argue "that politics alone drove decisionmaking," *id.* at 1476, is little short of hypocritical in situations where race and political party are virtually indistinguishable. As appellants show, allowing legislatures to draw district boundaries based on the political party of the voters being moved from one district to another is just as offensive to the First Amendment (and amicus would add, to Article I) as is racial gerrymandering that this Court has struck down in *Shaw* and its progeny. And once this Court establishes that parity, trial courts will no longer be faced with the task of sorting out a predominant motive when both are unlawful. Moreover, treating the two kinds of gerrymandering as functionally the same will end the necessity of bringing several rounds of cases to attack the same gerrymandering, which is what happened to the

same North Carolina Districts at issue in the *Shaw* and *Cooper* cases.

Finally, nothing in *Vieth* precludes appellants from obtaining the relief that they seek in this case. First, *Vieth* was an Equal Protection challenge, and this one is based on the First Amendment and Article I. That difference is meaningful because the meaning of the First Amendment and Article I are well-established in this context, but the difficulty in deciding when inequality in drawing district lines goes too far continues to be a perplexing one. Second, this case is a challenge to a single district, whereas *Vieth* attacked the entire congressional districting plan for the State. That matters mainly regarding relief (even the *Vieth* plurality agreed that the plan was of dubious constitutionality), whereas here the Court only must assure that the voters moved in and out of the Sixth District were not chosen primarily for political reasons and that a remedy can be devised to cure that wrongdoing, without having to take on the redistricting of the entire State.

To be sure, *Vieth* declined to apply the lessons from racial gerrymandering to political gerrymandering, in part for reasons noted in the prior paragraph. The Court also saw race as more immutable than political affiliation, but even if that is true, both kinds of gerrymandering assume that the targeted class is not subject to persuasion or change in its voting patterns, and it overlooks

the fact that even within areas where blacks (or Republicans) are in a significant majority, they never represent 100% of those whom the legislature has moved. And to the extent that those affected by a political gerrymander do not vote the way that is anticipated, that mainly means that the gerrymandering is less successful than desired, but the improper classification remains. *Cf. Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016) (*incorrect* belief that government employee had supported candidate for mayor did not insulate defendant from *Elrod* claim for unlawful First Amendment retaliation). Moreover, no matter the outcome in a given election under partisan gerrymandering, the State, not the People, would have had a major hand in picking the winner, contrary to the mandate of Article I.

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Appellants have established that their First Amendment and Article I rights have been violated by appellees' partisan gerrymandering of Maryland's Sixth Congressional District by moving massive numbers of Republican and Democratic voters, when only modest changes were needed. Moreover, it did so with the avowed goal of adding one Democratic member to the State's delegation to the House of Representatives. Political gerrymanderings of this kind undermine our democracy and, as shown by the racial gerrymandering cases, nothing precludes the

courts from ordering district-by-district relief to remedy the constitutional violation in these cases.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the District Court directed to conduct further proceedings on an expedited basis to correct the unconstitutional gerrymandering of Maryland's Sixth Congressional District.

Respectfully submitted,

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